HABIB BANK LIMITED

v.

SYKT. JOO SENG & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[SUIT NO. C 3462 OF 1983]
25 APRIL 1985

CIVIL PROCEDURE: *Order 12 r. 6 - Regularity - Judgment in default of defence obtained during time period set for defendants to appeal from earlier dismissal of an application.*

The Senior Assistant Registrar allowed the defendants to file a conditional appearance with certain provisos, in the said memorandum. The defendants filed an application to strike out the plaintiffs' suit but this was dismissed. The defendants duly filed their notice of appeal within the one month provided. However, judgment in default of defence was obtained by the plaintiffs a week before the one month expired. The defendants are challenging the validity of the default judgment.

Held:

[1] On interpretation of O. 12 r. 6, upon dismissal of the defendants' application, the conditional appearance is to be treated for all purposes as unconditional.

[2] Although the defendants had 14 days from date of dismissal to deliver a defence, they had not done so. Furthermore, when judgment in default was entered, the defendants still had not filed their appeal.

[3] The learned Judge said that r. 57 of Rules of the Federal Court 1980 did not bar the plaintiffs, in this case, from obtaining judgment in default of appearance. The judgment was therefore regular and could not be set aside on the irregularity ground.

[Application dismissed with costs.]

Legislation referred to:
Rules of the High Court 1980, O. 12 r. 6
Rules of the Supreme Court 1980, r. 57

Other source referred to:
White Book, [1979] vol. 1 para. 2 p. 112

For the defendants/applicants - Amarjeet Singh Sidhu; M/s. Tong Teck Yong & Co.
For the plaintiffs/respondents - Shanti Pathmanathan; M/s. Syed Alwi, Ng & Teoh

[**Editor's Note:** The notice of appeal was filed on 11 April 1985 under reference Supreme Court Civil Appeal 141/85]

JUDGMENT

VC George J:

On the 16 April 1984 both the defendants filed a conditional appearance to the writ. The Senior Assistant Registrar who allowed them to do so made the following endorsements to the memorandum of conditional appearance:

> This appearance is to stand as unconditional unless the Defendants apply within (14) days to set aside the writ and/or apply for a stay of proceedings and obtain an order to that effect.

The defendants duly filed their application (enclosure 13) to set aside the writ (and also asked for all further proceedings to be stayed or for the statement of claim to be struck out and for the plaintiffs' action against the defendants to be dismissed and for costs). This application was heard in open Court by Dr. Zakaria Yatim J who dismissed it with costs on 4 June 1984. The defendants had one month to appeal from that order dismissing the application and within that period, on 29 June 1984, they duly filed their notice of appeal. However, a few days earlier, on 22 June 1984 the plaintiffs had caused judgment in default of defence to be entered against both the defendants.

The defendants applied to set aside the default judgement contending that it was obtained irregularly. It was submitted that since the defendants had one month to appeal from the order dismissing the application to set aside, judgment in default of defence could not be regularly entered until the expiry of that month and then only if notice of appeal had not been filed.

Order 12 r. 6 provides that a conditional appearance is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited, to have the writ or the service of it set aside and **the Court makes the order sought** (emphasis provided).

It follows that upon dismissal of the application to set aside, the conditional appearance is to be treated for all purposes as unconditional. In volume 1 of the 1979 White Book, the commentary on conditional appearance has in the second paragraph at page 112 the following passage:

> ... The plaintiff is barred from taking any step based on the appearance (e.g. applying under O.14), until the time fixed as above stated has expired, but he may apply to strike it out. At the expiration of the time fixed (see last preceding note) if no application is made by the defendant, or if made has been dismissed (emphasis provided), the plaintiff may proceed with the action as if an unconditional appearance had been entered...

The defendants had 14 days from the date of the dismissal of their application to deliver a defence. In the instant case at the time that the judgment in default was entered, while the defendants still had time to file their notice of appeal, they had in fact not done so. Even if the appeal against the dismissal of the application had been filed, that *per se* does not operate as a stay of proceedings - see r. 57 of Rules of the Federal Court 1980:

> 57. An appeal shall not operate as a stay of execution **or of proceedings** (emphasis provided) under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

Clearly there was no stay of proceedings and when no defence had been delivered after the said 14 days, the plaintiffs were entitled to enter judgment in default of appearance.

The judgment was regular and could not be set aside for irregularity on which ground alone the defendants rested their application. It was dismissed with costs.

Also found at [1986] 1 CLJ 560